

BOARD OF APPEALS  
for  
MONTGOMERY COUNTY  
Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6600

**Case No. A-5752**

**APPEAL OF KAREN JOE**

OPINION OF THE BOARD

(Hearing held October 16, 2002)

(Effective Date of Opinion: November 19, 2002)

Case No. A-5752 is an administrative appeal in which the appellant charges administrative error on the part of the County's Department of Housing and Community Affairs (DHCA) in its issuance of a Notice of Violation (NOV) dated March 8, 2001.

A public hearing was held pursuant to Section 59-A-4.3 of the Zoning Ordinance. Associate County Attorney, Clifford Royalty, represented Montgomery County, Maryland. The appellant, Karen Joe, testified and presented her appeal.

Decision of the Board: Administrative appeal **granted**.

**FINDINGS OF FACT**

The Board finds by a preponderance of the evidence that:

1. The subject property is a single-family home owned and occupied by appellant at Lot 4, Block C, Olney Square Subdivision, located at 18508 Hedgegrove Terrace, Olney, Maryland, in the R-200 zone.
2. At the property is an unlined, dirt-bottom area originally designed as an in-ground pool which contains yard debris and other plant materials. The former pool is used for composting. Because the maximum depth of the pool is estimated at 7.5 feet, the Board previously determined that the pool should be enclosed by a safety fence. (See, Exhibit 14, Board Opinion of September 20, 2002, Case No. A-5648)
3. On or about March 5, 2002, DHCA inspector, Andrew Jakab, visited appellant's property and observed conditions which he believed constituted violations of the Montgomery County Code and which prompted him to issue an

NOV to appellant. (See, Exhibit 4). According to Mr. Jakab, the following defective conditions existed at the property:

- a. The in-ground compost area was not enclosed by a safety fence;
- b. The attic windows were missing and/or inoperable;
- c. Dead tree branches were hanging, creating a possible hazard in the event they broke and fell;
- d. Paint around the door and windows of the house was peeling.

4. Mr. Jakab testified that conditions remained largely the same when he returned to the property on or about May 20, 2002 and October 10, 2002, except that only one tree branch was observed during the October 10 inspection.

5. Ms. Joe denied the existence of each of the alleged conditions. The Board finds the testimony of Ms. Joe regarding conditions at the property to be credible and persuasive and accepts the following facts which she presented: Ms. Joe enclosed the pool with a mesh fence in December, 2001. The fence was difficult to see from the front yard where the inspections took place. Although the windows were old, they did open and operate in the manner originally intended. The one dead branch which was hanging at the property did not overhang the house and did not create a hazard. While areas of the house exterior may have had chipping paint, there was no water damage or seepage, and no evidence of deterioration to the exterior surface of the house.

## **CONCLUSIONS OF LAW**

1. Section 59-A-4.3(e) of the Zoning Ordinance authorizes *de novo* appeals to the Board from any action taken by a department of the County government, including the Department of Housing and Community Affairs.

2. As the issuance of the NOV was heard *de novo*, the Board hearing was an entirely new hearing on the propriety of the NOV as if no determination had been made by DHCA. *Boehm v. Anne Arundel County*, 54 Md. App. 497, 511, 459 A.2d 590, 599, cert. denied, 297 Md. 108 (1983)

3. The County had the burden of demonstrating that the DHCA NOV was properly issued. Since the Board hearing proceeded as an original administrative determination, the burden of proof and burden of persuasion were allocated as with the original determination by DHCA. See, *Lohrman v. Arundel Corp.*, 65 Md. App. 309, 318, 500 A.2d 344, 349 (1985). The *de novo* hearing puts all parties back at square one to begin again just as if the DHCA determination appealed from had never occurred. See, *General Motors Corp. v. Bark*, 79 Md. App. 68, 79, 555 A.2d 542, 547 (1989).

4. The County failed to establish that the NOV was properly issued, specifically:

a. Section 26-10(m) of the Code provides that “every owner must eliminate any condition which creates a public nuisance.” The County failed to establish that the compost area was not enclosed by a fence. In fact, the evidence established that the excavated area was enclosed by a fence. Therefore, no nuisance was created under Section 26-10(m).

b. Section 26-8(b) of the Code provides that “every window. . . must be reasonably weather-tight, water-tight and rodent-proof, and must be kept in sound working condition and good repair.” The County failed to establish that the windows were missing or inoperable and that they did not function in the manner in which they were originally intended under Section 26-8(b) of the Code.

c. Section 26-10(j) of the Code provides that “every owner must maintain shrubbery, trees, vines, hedges and other vegetation, including dead trees and branches, so they do not constitute a danger to the public health or safety.” The County failed to establish that the one dead branch at the property, which did not directly overhang the house or any public area, created any hazard to the public health or safety.

d. Section 26-8(g) of the Code provides that “all exterior wood surfaces must be adequately protected from water seepage and against decay.” The County failed to present any compelling evidence that the exterior surface of the house was not adequately protected under this provision.

On a motion by Allison Ishihara Fulz, Louise Mayer, seconded by Donna Barron, with Board members Angelo Caputo, Louise Mayer, and Chairman Donald H. Spence, Jr., in agreement, the Board voted to **grant** the appeal. The Board adopts the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

---

Donald H. Spence, Jr.

Appeals

Chairman, Montgomery County Board of

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 19<sup>th</sup> day of November, 2002.

---

Katherine Freeman  
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.